

# FCC Chairman Announces Proposal to Classify Internet TV Services as Cable Providers

**October 30, 2014**

Over the past month, there have been many reports that the FCC would soon publish an NPRM classifying an online video distributor (OVD) that delivers linear streams of video programming as an MVPD ("multichannel video programming distributor"), which *inter alia* would allow OVDs to take advantage of the FCC's program access rules and to negotiate retransmission consent with broadcasters, who would be subject to the requirement of "good faith negotiations."

On October 28, 2014, in an [announcement posted on the Official FCC Blog](#), FCC Chairman Tom Wheeler circulated such a proposal:

*"Today I am proposing to extend the same concept to the providers of linear, Internet-based services; to encourage new video alternatives by opening up access to content previously locked on cable channels. What could these over-the-top video providers (OTTs) supply to consumers? Many different kinds of multichannel video packages designed for different tastes and preferences. A better ability for a consumer to order the channels he or she wants to watch."*

Specifically, Chairman Wheeler proposes the start of a rulemaking proceeding to modify the interpretation of the term MVPD "so that it is technology-neutral" and turns on the type of services the applicable provider offers, as opposed to how those services are delivered to the consumer. If successful, the new rule would reverse a prior Media Bureau-level finding that an MVPD has to control both the content and the "transmission path" that delivers the video programming. In the ["Sky Angel" case](#), the FCC Media Bureau ruled that, with respect to Sky Angel's Internet TV service, it was the subscribers' Internet service providers that provided the "transmission path" and therefore Sky Angel could not qualify as an MVPD.

Chairman Wheeler also proposes extending certain MVPD program access rules to Internet TV services to prevent, in his words, vertically integrated networks (i.e., cable companies that also own video content) from "rais[ing] artificial barriers to competition by refusing to let their video competitors have access to the programming they own."

Notably, the proposed new OVD rule would apply only to providers that offer "linear" streams of programming, and not to video-on-demand services like Netflix or Hulu.

The MVPD proposal has garnered a lot of attention from the media and for good reason. However, Wheeler's official proposal has not yet been fully released to the public, leaving a number of open questions:

- *Access Rules and Retransmission Consent:* If such reforms are implemented, online providers would be granted status as bona fide providers and given the same right to negotiate for carriage of broadcast television content as traditional cable and satellite providers. However, Chairman Wheeler's post did not mention how far access rules would apply beyond integrated providers and whether current rules that require broadcast networks to negotiate retransmission consent in "good faith" would be strengthened or remain the same.
- *Interplay with Copyright Law:* It is also unclear how any rule change would mesh with copyright law. It remains an open question whether these newly-minted MVPDs would be deemed "cable systems" under Section 111 of the Copyright Act (which outlines the statutory licensing scheme that allows cable systems to get compulsory copyright licenses for the channels they carry). To be sure, the Copyright Office has previously stated that the Section 111 compulsory license would be available to those transmission services regulated as cable systems by the FCC.

*OTT Feasibility:* From a technical perspective, it's not completely clear that the current broadband "pipes" are ready to handle a large influx of OTT services. Currently, there are about 50 million Netflix subscribers, a service which reportedly accounts for about 34% of Internet traffic at the busiest times of the day. It is not clear what will happen if even a small percentage of the almost 100 million cable and satellite subscribers switch to over-the-top services showing linear programming. In Chairman Wheeler's vision, the expansion of program access would "stimulate the high-speed broadband build-out," presumably a necessary condition to large-scale adoption of Internet distribution by viewers.

With many technology companies, start-ups and big content providers waiting in the wings to offer legal, licensed over-the-top video streaming services, and the courts wrestling with the legality of online video distribution of copyrighted programming, it seems that the climate is ripe for reform. In Chairman Wheeler's view, "the mantra 'Competition, Competition, Competition' fits perfectly with consumers' desires for video choices" and he sees the country as no longer in an era "where it [is] necessary to build a purpose-specific pathway to deliver video." Yet, given the complexity of the issues involved and the number of interested parties, the details of the final changes to rules (if any) are far from certain.

We will keep you posted as we learn more about the FCC proposal and would be happy to discuss the potential impact on your business at any time.

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